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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1298

JOHN J. McMULLEN ASSOCIATES, INC., *Petitioner*

v.

STATE BOARD OF HIGHER EDUCATION, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statement of the Case	2
Reasons for Granting Writ	3
Conclusion	13

CITATIONS

CASES:

King County v. *Seattle School District No. 1*, 263 U.S. 361, 68 L.Ed. 339 (1923) 7

Opinions of the Comptroller General:

38 Comp. Gen. 276, 119 U.S.P.Q. 187 (1958) 6

B-153348 (April 22, 1964) (unpublished) 6, 11

STATUTES:

28 U.S.C. § 1254 2

28 U.S.C. § 1338 3

28 U.S.C. § 1498 .....2-4, 6, 8, 13

31 U.S.C. § 638(b) (formerly 5 U.S.C. § 78(b)) 11

41 U.S.C. § 5 10

41 U.S.C., Chap. 4, §§ 251-260 .....11, 12

REGULATIONS:

32 C.F.R., Chap. 1, Subchap. A, Parts 1-30 11

41 C.F.R. 11

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Petitioner, John J. McMullen Associates, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, which dismissed petitioner's suit.

OPINIONS BELOW

The opinion of the U. S. District Court for the District of Oregon is reported at 268 F. Supp. 735 and is reprinted in Appendix A of this Petition, pp. 1a-9a. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 406 F.2d 497 and is reprinted in Appendix B of this Petition, pp. 10a-11a.

JURISDICTION

The judgment of the Court of Appeals is dated January 23, 1969, and was entered on the same date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Since no prior decision in this Court or any other court of the land has dealt directly or indirectly with the issues of this case, the questions presented for review are:

1. Does the exclusive jurisdictional requirement of 28 U.S.C. § 1498 (suits for patent infringement resulting from Government procurement must be brought in the Court of Claims) apply to preclude maintaining suit in District Court for patent infringement by a grantee using Federally-granted funds?

2. Is a grantee's infringing activities funded by a Federal grant "for the Government [United States]" within the meaning of 28 U.S.C. § 1498?

STATEMENT OF THE CASE

Petitioner is the owner of several patents relating to roll stabilizers for ships. Oregon State University, controlled by respondent State Board of Higher Education, obtained title to a ship (F/S 210) from the United States Government and, subsequently, privately contracted with respondent Albina Engine & Machine Works, Inc., to convert same to an oceanographic research ship using grant funds obtained from the National Science Foundation. In the conversion, a roll stabilizer infringing upon petitioner's patents was installed. Use of the ship by Oregon State University for oceanographic research was totally funded by Fed-

eral money received from Navy Department and Atomic Energy Commission contracts and National Science Foundation grants.

Action for patent infringement was commenced in the United States District Court for the District of Oregon, jurisdiction being predicated upon 28 U.S.C. § 1338(a). The District Court, following a trial on the segregated issue—lack of jurisdiction, 28 U.S.C. § 1498—dismissed the suit because respondents' infringing activities using Federally-granted funds were "for the Government" and, therefore, covered by 28 U.S.C. § 1498.

Appeal was taken to the Court of Appeals for the Ninth Circuit. After hearing argument, the Court affirmed the lower Court, but restricted its holding to the facts of this case and expressly did not embrace the District Court's holding that § 1498 covers all research grants.

REASONS FOR GRANTING WRIT

This case involves a timely and important question of Federal law which has not been, but should be, settled by this Court, namely, does 28 U.S.C. § 1498 cover infringing activities funded by Federal grants. There is no other prior decision in this Court or any other court of the land which has dealt with this question directly or indirectly. All other prior cases involving § 1498 concerned Government contracts.

The Federal Government, has, for many years, funded a number of programs using grants, among the more common being disaster relief, health, and agriculture. Since World War II, the Federal Govern-